

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**



74-1735

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EMPIRE TRANSPORT INC., as owner  
of the Steamship POTOMAC,

*Plaintiff-Appellant,*

—against—

UNITED STATES OF AMERICA,

*Defendant-Appellee.*

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## APPELLANT'S REPLY BRIEF

The brief for appellee fails to meet the issues presented on this appeal. Appellant has demonstrated in its brief by accurate and complete references to the trial record that:

- 1) The DMA chart N.O. 51222 did not show that the underwater section of the Jetty Delure extended 400 yards from the visible end of the Jetty and that the visible end of the Jetty was 100 yards further to the east than shown on the chart.
- 2) DMA admittedly had knowledge that the underwater section of the Jetty extended 400 yards from its visible end and that the visible end extended 100 yards further to the east than shown on the chart.
- 3) DMA admittedly had the information describing the Moroccan buoyage system and could have included it in

the Sailing Directions when it was revised in 1970. It did not and the Moroccan buoyage system was not described in any other maritime text used by United States mariners.

POTOMAC's chart was *dead wrong* as to the conditions existing, the depth of water, position of the visible end of the Jetty Delure, the length of the underwater extension and the buoyage system. If a well qualified master mariner could not rely on the accuracy of charts prepared and published by the United States of America, United States vessels would not be able to engage in navigation to and from foreign ports.

In this case, DMA could have prevented the stranding by furnishing POTOMAC's master with a chart showing the Jetty Delure with the visible end in its proper geographical location, 100 yards to the east of where it was shown on the chart, and a 400 yard underwater extension instead of the 250 yard extension shown. If that had been done, DMA's Anderson's self-serving platitude would have some merit (AB, 22).<sup>\*</sup> POTOMAC's experienced master certainly would not have directed her course over an obstruction he could see on the chart.

Appellee's argument that the underwater extension as known to exist by DMA was not shown on any other foreign chart falls flat. The latest French chart which DMA had in hand and which it compared with chart N.O. 51222 shows that the visible end extended 100 yards further than on N.O. 51222. The French chart does not delineate the end of the construction area nor is there a depth curve which

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<sup>\*</sup> References to Appellee's Brief.

delineates the shallow area (Cf. Exh. D, A. 461a and Exh. 13, A. 313a). The absurdity of appellee's contentions is that DMA's Anderson believed that the difference was a danger to navigation and thought it was significant enough to make reference to it in the Sailing Directions. But, for whatever reason, Anderson failed to pass along the dangerous condition to the DMA's Notice to Mariners and chart sections.

Appellant's brief sets forth the cold, hard evidentiary facts supporting the inaccuracies in the chart and the omissions in the Sailing Directions which are *uncontradicted* by appellee in its brief.

Appellee's defense to this action is to attack the credibility and competency of POTOMAC's experienced master, alleging acts of negligence that fall apart when carefully examined, which we expect this Court will do, in view of the obvious inconsistencies, erroneous findings and unsupported conclusions in the District Court's opinion.

Appellee's "Counter Statement of the Facts" (AB, 4) requires reply in that it not only contains misstatement of facts but argument of counsel.

The total weight of a vessel is not the sum of the gross tonnage and the cargo carried. Gross tonnage is a measure of internal cubic capacity in terms of 100 cubic feet per ton and does not represent the weight of the vessel without cargo (*Knight's Modern Steamship*, 12th Ed., p. 54). The references to the District Court's opinion (481a-482a) setting forth the gross tonnage and the quantity of cargo does not support counsel's conclusion that the POTOMAC's total weight was 36,500 tons (AB, 4).

The description of the position of buoy CA5 as "a little further to the northeast" (AB, 4) is an attempt to gloss over the 800 yard distance from the visible end of the breakwater and 550 yards from the submerged outer extremity of the Jetty. Minimizing the distance in the facts lays the foundation for the later contention that buoy CA5 was "close" to the underwater extremity and therefore, marking it (AB, 7, 20). More than a quarter of a mile of water with depths in excess of 30 feet existed between the submerged outer extremity of the breakwater and buoy CA5, according to chart N.O. 51222—surely more than ample sea room for a vessel to pass safely between the Jetty and the buoy, *if the chart was not grossly inaccurate.*

The "entrance range" of 228° is meaningless until a vessel is south of buoy CA5 and is only used to steer on once a vessel is *inside* the Jetty heading for its berth. However, the range appears on N.O. 51222, the chart used by POTOMAC as it approached.

There is no evidence in the record that the Notice to Mariners published for the first week of January 1972 pertaining to Casablanca were disregarded or ignored by POTOMAC's navigators (AB, 5). It is perfectly clear that had the discrepancies which were known to DMA been published in the Notice to Mariners, POTOMAC's navigators would have had the corrections at commencement of the voyage and navigated accordingly.

Appellee cites Captain Wadleigh, plaintiff's master mariner expert, for the proposition that a mariner should use two charts N.O. 51220 and N.O. 51222 to properly approach Casablanca (AB, 5). Wadleigh's testimony does not support that proposition; nor does the citation of McCloud's



testimony (AB, 5). Appellee goes on to *argue* that the two charts are required to enter Casablanca (AB, 5). It should be obvious to appellee that if POTOMAC's master navigated her from the Gulf Coast of the United States to Casablanca via Freeport in the Bahamas and arrived 1.6 miles off Casablanca, that it was not necessary to go three miles to the north in the open sea to find the Port of Casablanca.

The "ocean depth curve chart 51013" is a navigating chart which mariners use approaching a landfall. POTOMAC's landfall, with unlimited visibility and a radar picture from 48 miles off shore, put POTOMAC in a position to arrive at Casablanca within 30 minutes of the ETA her master gave two days before (Exh. V-13, A. 485a).

Appellee strains to charge POTOMAC's master with knowledge of the Moroccan buoyage system (AB, 6). The only knowledge that he could be charged with is a *remembrance* of the reverse side of a disposable Pilot Chart that was published five years before this casualty (Exh. 103, A. 327a). And there is no evidence of which one of the set of four pilot charts POTOMAC's master saw.

Other than the five year old Pilot Chart, there was no way that POTOMAC's master could know what the Moroccan buoyage system was. However, on these facts, appellee concludes that POTOMAC negligently violated the applicable buoyage system (AB, 6).

An example of appellee's distortion of the record is the excerpt from Captain Hansen's deposition testimony (AB, 7—repeated AB, 20). The full and correct quote is as follows:

"If I had stepped it off and noticed the extension of 400 yards, I wouldn't have gone in *but I would have*

*had to check the chart out and I have to assume that the charts are correct."*

At the trial, counsel read only the part quoted in the brief and not italicized above (A. 220a). It was only after appellant's counsel insisted that the entire answer be read that the italicized portion above was read by appellee's counsel (A. 221a).

Appellee suggests that POTOMAC knew or should have known of the "Moroccan Vizerial Order of February 20, 1967" (AB, 8). That order is not mentioned in DMA's Sailing Directions, the customary reference used by mariners.

There is no evidence that POTOMAC "ignored specific cable instructions to the pilot station". The POTOMAC admittedly did not have a VHF and could not have contacted the pilot station (AB, 8-9). If POTOMAC did not speak to the pilot station by telephone in the half hour before she stranded and after the agent's message was sent, there has been no suggestion in the record or appellee's brief that POTOMAC would have met the pilot at any position other than at buoy CA5 for which she was undisputedly headed immediately prior to the stranding. It is obvious from appellee's brief that the radio telephone conversation POTOMAC had with her agent was relayed immediately to the pilot station and that the pilot proceeded out from the station to meet the POTOMAC at buoy CA5 (A. 76a).

Appellee's speed "facts" (AB, 9) are hypothecations by appellee in an effort to demonstrate excessive speed and "forcing" entry into Casablanca. Appellant's brief Point IV, pp. 27-29, fully demonstrates that POTOMAC's speed was reasonable. There is no evidence that it was excessive or

that in the undisputed clear weather that it was immoderate. Whether POTOMAC was proceeding at 2 knots or 9 knots is irrelevant. Her course was directed to the point where she stranded because Chart N.O. 51222 showed there was sufficient water for her to navigate safely. If she had proceeded on the same course at 2 knots she would have stranded in the same place.

Appellee's ultimate misstatement of the "facts" is found on page 10. There the unsupported statement of fact is made that:

"The turn to right was due to Captain Hansen's hurry to get into the harbor and his failure to contact the pilot station, his failure to wait for the pilot and due to the vessel's excessive speed".

Such unsupported assertions should not have been accepted by the District Court and the adoption of such are grounds for reversal.

### **Answering Appellee's Point I**

Captain Hansen relied on DMA's Chart N.O. 51222 which was the believed to be, and should have been, the best information available to a master of a vessel entering Casablanca (Appellant's Brief, Point I, pp. 10-11). Appellee's vague accusations of fault without specificity are not helpful to this Court (AB, 10).

Although the theoretical boundary line for the port is 200 yards north of buoy CA5, it is clear from all the evidence that vessels pick up pilots near and south of Buoy CA5 (Appellant's Point V, pp. 25-7). This is confirmed by



the French Sailing Directions for 1970 which states "*Pilots board vessels near lighted Buoy CA5*" (A. 321a).

Appellee's reference to District Court's finding at A. 583a that POTOMAC did not follow the Sailing Directions with respect to the "International Code" is inaccurate (AB, 12). There is no such finding by the District Court.

Appellee relies heavily upon POTOMAC's master's testimony at the trial to establish that he did not refer to Chart N.O. 51220. Hansen's testimony reveals two things:

(1) That the "smaller scale ocean depth Chart N.O. 51013" (a chart which the District Court objected to receiving in evidence—Exhibit Q for identification, A. 248a) was a chart used when POTOMAC was 50 miles from Casablanca and three and a half hours before her arrival off Casablanca at which time her noon position was transferred from the navigation plotting sheets to the largest scale navigational chart available (N.O. 51013), obviously to determine the relationship of her noon position to the coastline of North Africa and the course from that position to Casablanca. Captain Hansen's testimony was:

The Court: Well, let's see if I get the significance of this.

Were you using this Chart [Exhibit Q for identification] to plot any information on or plot any courses contemporaneously on the day of February 26, 1972.

A. We put our noon position on it which we took off of a plotting sheet which is just a blank showing the latitude and longitude and it was transferred over. We didn't do any—we just transferred positions over to

it. Put a rough course line through it. It also shows the noon 25th out here. Our navigation is done on plotting sheets and we did very little on this one. Paper, pencil work on this one, no pencil work on the next chart going in and most of ours, because we were in radar range on the other chart that you mentioned, that one.

Q. That Exhibit R? A. Exhibit R. Now we get close and those have not much meaning until we get close. We make our visual inspections of that chart (indicating) and R and we are getting in close for the approach, making the actual approach, we are using 51222." (A. 250a-251a)

(2) There is no dispute that the small scale coastal chart N. O. 51220 was aboard (A. 246a). Contrary to the District Court's confused findings, POTOMAC's master did refer to it and he so testified:

Q. Did you do any navigating on that Chart, Captain? A. No. I didn't make any marks. I used it for navigation. It was out there. I had it on—I had three or four charts I think, stacked up. This is one of them.

Q. But you did not do any navigating on this Chart? A. Yes. I used visible navigation. I used the chart. I didn't make marks on it. It wasn't necessary (A. 247a).

Captain Hansen's testimony is clear that he used the small scale off-shore chart N.O. 51013 to plot his noon position on February 25th and again on February 26th to obtain his position relative to the North African land mass. The navigational use of the chart for this purpose was entirely proper. There is no other testimony that appellee has or

can refer to that even implies that POTOMAC's navigators used the small scale off shore for any other purpose.

Appellee is wrong in suggesting that POTOMAC used N.O. 51013 to approach Casablanca Harbor (AB, 12-13). It was used to approach the coast of North Africa *before* the land mass was in sight or visible on radar as testified to by Captain Hansen above and which was clearly understood by appellee's counsel at the trial:

"Mr. Schulmeisters: I just wanted to suggest, to bring out, your Honor, \* \* \* That any navigational marks approaching Casablanca are on this ocean depth curve chart about 50 miles away which does not show any of the buoys or ranges." (A. 249a)

Once Casablanca was visible on radar, it was unnecessary to plot on any other chart (A. 251a). The radar picture presentation showed the three buoys on the small scale coastal chart and the exact relationship of the POTOMAC to the buoys and the entrance to Casablanca. Even if POTOMAC's navigators had not referred to the coastal chart, they had all the information the chart had on it displayed on the radar as POTOMAC approached Casablanca. The District Court overlooked Captain Hansen's testimony to this effect and failed to understand the significance of it.

Further, appellee's assertion (AB, 13) that appellant's expert Wadleigh admitted "that a navigator not familiar with Casablanca Harbor should follow the line of buoys CA1, CA3" is unsupported by the appellee's reference to the record (A. 399a-41a). That testimony referred to the course a vessel should take after it passed south of buoy CA5 and was heading for her berth. Captain Wadleigh's answers on cross-examination with respect to the side

the buoys should be passed on was based on the information given to him from the reverse side of the outdated Pilot Chart and amounted to a hypothetical hindsight question and answer (Exh. 103, A. 327a).

Appellee's reference to the record with respect to Hunziker's testimony (AB, 13) is equally inaccurate and unfair. His full testimony, which was not included in the Joint Appendix is:

Q. Under the American system what does that black buoy mean? A. A black buoy when entering should be left on the portside.

Q. On February 26, 1972, did you have any reason to believe that the Moroccan system was the same as the American system? A. No. But I had no reason to believe that it was different. (Exh. 115, p. 18)

• • •

Q. With that knowledge that you had at that time should a vessel—

Mr. Smith: On February 26, 1972?

Mr. Schulmeisters: Yes.

Mr. Smith: This relates back to your knowledge on February 26, 1972, not yesterday or today.

Mr. Schulmeisters: That's right.

Q. How should a vessel then proceed after having reached buoy CA1? A. Not knowing that the marking system was different from the American system, on entering buoy CA1 would have been left on the portside.

Q. How about buoy CA3 and CA5? A. Also on the portside, as they are black.

Q. And that would be navigating pursuant to the



American system? A. Pursuant to the American system.

Q. At that time you did not know that the marking system was different? A. Yes. (Exh. 115, p. 21)

The District Court made no clear finding that a vessel must approach from buoy CA1. There is no evidence in the record to support such a finding. (Appellant's Brief, p. 27). Captain Wadleigh's testimony was undisputed and uncontradicted on this point. If any part of the District Court's opinion can be construed as requiring a vessel to so navigate, it is based on hindsight and cannot be a basis of a charge of negligence as suggested by appellee (AB, 13).

We have dealt fairly and squarely with the facts regarding the knowledge POTOMAC's navigators should have had and did not have regarding the Moroccan buoyage system (Appellant's Brief, Point IV, pp. 22-25). The appellee has not met our point in its brief (AB, 13-15). The facts are simply stated:

- 1) DMA had the information describing the Moroccan buoyage system for at least five years before the stranding and failed to include it in the primary source available to a United States mariner—*DMA's Sailing Directions* (Exh. H, A. 464a). The omission of this important information is inexcusable.
- 2) Contrary to the District Court's finding and appellee's assertions, Bowditch *does not* reveal which of the three commonly used buoyage systems in the world was in use in Morocco.
- 3) In the absence of information to the contrary, POTOMAC's navigators had a right to rely on what they saw on the charts and the absence of the Moroccan

buoyage system in the Sailing Directions (Appellant's Brief, p. 24).

The attack on POTOMAC's master's credibility is unjustified by appellee (AB, 15-16). Bowditch could not have given him the buoyage system for Morocco. The suggestion that Captain Hansen engaged in some falsification with respect to the log book or falsified or subverted the facts in this stranding is hogwash. When the third mate Hunziker's testimony was taken by the Government to show some imagined skullduggery on the part of Captain Hansen, Hunziker testified with respect to the entries he was ordered by Captain Hansen to make as follows:

Q. If there had been anything wrong with them you wouldn't have made them, is that correct? You would have refused to make them? A. I would have refused to make the statement, yes.

. . .

Q. Were you asked to make any entries that were incorrect? A. No, sir, I was not. (Exh. 115, pp. 105-106)

The simple entries of fact with respect to the stranding are recorded in POTOMAC's Bridge Log for February 26, 1972 and speak for themselves (Exh. E, A. 463a). Hansen's unrecalled letter to the harbor master was an attempt on his part to relay to the Moroccan authorities that there was an uncharted obstruction, which is certainly undisputed in this case.

Reference to an erasure on Exhibit S is still another desperate attempt on the part of appellee to discredit Hansen by innuendo. An examination of the Exhibit does not reveal any significant or relevant erasure.

We have dealt with the failure of the Government to provide a correct chart to the POTOMAC in our Point I—pp. 10-16. Appellee's reply to that Point is to admit that the POTOMAC did, in fact, strand 400 yards from the breakwater where chart N.O. 51222 shows 54 feet of water at low low water (AB, 18) and it weakly argues that appellant's charge that N.O. 51222 was grossly inaccurate and a trap "is not fully consistent with the evidence" (AB, 16). DMA's Anderson's failure to disseminate the information on the danger, no matter how indefinite he felt it might be, is inexcusable. Appellee's explanations for his failure are patently absurd when DMA's Notice to Mariners Section and Chart Section thought it important enough to put out a Notice to Mariners in January 1972 for three insignificant corrections to chart N.O. 51222 (See original Exhibit PP, not in Joint Appendix). The fact is that chart N.O. 51222 was issued to the POTOMAC with DMA's full knowledge that there was an existing danger between the end of the underwater extension charted on N.O. 51222 and buoy CA5. A simple notation could have been made on the chart at the time Anderson obtained the information to effect that the Jetty might extend further than charted, warning mariners of the possible existing danger. Instead, the chart shows a clear unobstructed passage with a minimum depth of 36 feet at low water between buoy CA5 and the six fathom curve surrounding the end of the breakwater.

Appellee's exhortations that the Sailing Directions were sufficient to warn the POTOMAC's navigators not to proceed between the buoy and the Jetty (AB, 20) makes a farce out of appellee's contention that DMA should not be charged with responsibility for the failure to show the danger on the chart. If the danger is so obvious to ap-



pellee now from a mere reading of the Sailing Directions, should not the danger have been clearly shown on the primary navigational aid used by prudent mariners?

It is clear from the testimony of both POTOMAC's master and watch officer that neither would rely on the distance mentioned in the Sailing Directions.

POTOMAC never headed for the Jetty as suggested by appellee (AB, 21). At the time of the stranding the POTOMAC should have been in at least 54 feet of water, at least 150 yards from the underwater extension of the Jetty (according to chart N.O. 51222) and was heading in a southerly direction (Exh. D, A. 461a, Exh. S, A. 479a).

The appellee's argument that chart N.O. 51222 indicates the danger is just plain nonsense. The standard chart symbols were used to designate the "work in progress" area and the clear delineation of the foul water from the good.

A mariner has a right to rely on the information a chart gives to him when the chart on its face shows that it was corrected to within two months of its use and there are no outstanding Notice to Mariners that would change the representations on the chart. Captain Hansen would have needed a crystal ball to know that the chart was dead wrong, and that danger existed between buoy CA5 and the Jetty. Hence, the cases cited by appellee (AB, 21) are meaningless.

Captain Jungerheld who had made numerous voyages into Casablanca over a period of 25 years, when cross-examined on his opinion that he would not pass between buoy CA5 and the breakwater (AB, 22) admitted it was

based on the information he had received from the 1952 Edition of the Sailing Directions which warned:

"It is dangerous to pass between the new extension and the buoy" (A. 389a, 391a, 396a, Exh. 112, 400a).

When questioned further, he testified:

Q. In your service for American Export Lines, wasn't it common for you to enter ports where you had less than 100 yards clearance of a breakwater? A. Yes.

His further testimony with respect to the 6 fathom curve around the end of breakwater confirms that a mariner would expect to have at least 36 feet of water between buoy CA5 and the 6 fathom depth curve clearly marking the end of the construction area of the breakwater (A. 296a-297a).

Captain Jungerheld, contrary to his conclusion that it was imprudent to pass between the buoy and the breakwater, admitted that chart N.O. 51222 showed no construction between the 6 fathom curve and the buoy and that the chart showed a fairway between the end of the Jetty and the buoy. He testified:

Q. What does the chart show here? Does the chart show any construction between the six fathom curve and the buoy? A. No, it doesn't.

Q. What is the purpose of the prohibited area between CA-5 to the westward where this red line goes in a northerly direction, where it says, "Prohibited anchorage"? A. That's to clear the approach in and out of port.

Q. And that includes the area off the end of the breakwater, doesn't it? A. Yes, it does.

Q. Isn't that called a fairway? A. The fairway would be running through there, yes. (299a-300a)

Of course he knew from personal experience that the chart was wrong (A. 292a) and that was really the basis of his opinion and not anything he could get off the chart or from the current Sailing Directions.

Anderson's testimony is totally inconsistent with Captain Jungerheld's testimony as to the information chart N.O. 51222 gave to a mariner. Anderson's absurd excuse for his failure to initiate a correction in the chart, "Mariners, do not run your ship upon the breakwater between the buoy and the breakwater" (AB, 22) is in direct conflict with all the testimony of the qualified master mariners including Jungerheld that there is no construction or breakwater shown between buoy CA5 and the 6 fathom curve which clearly delineated a fairway between the buoy and the breakwater. Captain Hansen's interpretation of the chart did not differ. He cannot be accused of negligence on that basis.

### **Appellee's Point II**

We dealt with POTOMAC's use of charts N.O. 51013 and N.O. 51222 at pp. 8-10, *supra*.

Contrary to DMA's published warning on chart N.O. 51220 that chart N.O. 51222 should be used in the area in which POTOMAC stranded, appellee nevertheless contends that if POTOMAC used chart N.O. 51220 she would have avoided the stranding (AB, 24-5), although conceding that the larger scale chart N.O. 51222 should be used in harbor navigation. Appellant's brief, Point III, pp. 19-20 fully meets appellee's contention.

Appellee is grasping for a straw when it finally blames the Court's numerous erroneous findings on a typographical

error (AB, 25). There are two reasons why that assertion is false: First, the Court in the same sentence said that chart N.O. 51222 was "obviously the best and most applicable chart for approaching the *inner harbor*". That is what POTOMAC was doing at the moment of stranding. Secondly, the finding is supported by the evidence adduced at trial (Appellant's Brief, Point III).

There has been no "lumping" together of two different findings into one apparent sentence in appellant's brief (p. 21). The quotation consists of the Court's conclusion of law and a single finding of fact.

Appellant could not quarrel with that finding if POTOMAC were not using chart N.O. 51222 when she stranded. The facts support the finding that POTOMAC's navigators did use and rely on it and appellee apparently does not dispute that they did.

Bothered by the Court's clearly erroneous finding that POTOMAC was proceeding at 9 knots, appellee attempts to support a conclusion that POTOMAC was in any event proceeding too fast. Before that conclusion can be reached, there must be a finding of speed in accordance with the evidence, which this Court must now make. Appellee's counsel makes the unsupported conclusions that a "36,500 ton vessel will not lose 6 to 8 knots speed in good weather in 4 minutes" and "could not have moved at 4-6 knots at the stranding", without a single reference to the record. Those conclusions are not supported by the record and common sense should tell one that if a vessel is travelling at an initial speed of 12 knots and has an average speed of 9 knots, the terminal speed must be substantially lower than 9 knots to obtain the average speed. Appellee's other attempts to support a finding of excessive speed are equally futile.



We respectfully submit that this Court should scrutinize the record on this appeal which appellant believes can only lead to a conclusion that the sole proximate cause of the stranding was the failure of appellee's DMA to furnish POTOMAC with a correct chart and information it had on the buoyage system used in Morocco but which it did not include in the Sailing Directions.

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Respectfully submitted,

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